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UNCLAS SECTION 01 OF 03 MADRID 000800

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EUR/WE FOR ALLEGRONE, CLEMENTS, AND CERVETTI
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SUBJECT: SPAIN/COUSO CASE: JUDGE CHARGES US SERVICEMEN WITH
"CRIMES AGAINST INTERNATIONAL COMMUNITY"

REF: A. MADRID 215
[1](#)B. MADRID 141
[1](#)C. MADRID 101
[1](#)D. MADRID 42
[1](#)E. MADRID 26

MADRID 00000800 001.2 OF 003

[1](#)1. (SBU) Summary. National Court Judge Santiago Pedraz issued formal charges of murder and "crimes against the international community" against the three US servicemen named in the legal case filed by family members of Spanish cameraman Jose Couso, who was killed by US fire during the capture of Baghdad in April 2003 (reftels). The most serious charges are punishable by 10-15 year imprisonment. According to press reports, Judge Pedraz transmitted a Mutual Legal Assistance (MLAT) Request to "US authorities" in connection with this charging document, with the MLAT evidently intended to advise the servicemen of these charges rather than requesting action on the part of the USG to extradite them to Spain. The charging document indicates that if the three servicemen were brought before the court, they would be required to present a one million Euro bond to meet their potential civil liability in the case. The National Court prosecutors have three working days to appeal the charges; if there is no appeal, the case will move forward. The indictment is notable for the absence of any acknowledgement that there were ongoing military operations during the incident in Baghdad and for the use of alleged statements to the media by the defendants to justify the charges against them. The DCM contacted Julio Perez Hernandez, Secretary of State for Justice (equivalent to an Undersecretary) to discuss Pedraz's presentation of charges, noting the USG's respect for Spanish judicial independence, but also the USG's disappointment with this development in light of the extensive USG report on the incident which was shared Spanish authorities. Perez Hernandez said he would contact the National Court Chief Prosecutor to ascertain how the Prosecutor's Service would handle this case. Spanish law does not permit trial in absentia, so it is possible that the case could be archived if the defendants do not appear in a Spanish court. However, this is an unacceptable outcome since it will leave charges pending against the three servicemen; we will continue to press for dismissal of the charges. End Summary.

//THE CHARGES//

12. (SBU) In a document filed by the National Court the afternoon of April 27 (immediately prior to a major Spanish holiday weekend), Judge Pedraz formally charged US servicemen Lt. Colonel Philip de Camp, Captain Philip Wolford, and Sergeant Thomas Gibson with "crimes against the international community" and "aggravated murder" in connection with the death of Spanish cameraman Jose Couso on April 8, 2003 during the US capture of Baghdad. The indictment was broken down into three parts: a background of the case, a discussion of the judicial aspects of the case, and the Judge's presentation of charges against the three servicemen. Post is preparing an informal translation of the indictment to be transmitted to the Department and to DOJ, but a summary of the document follows below:

-- Background:

Judge Pedraz discusses key elements of the invasion of Iraq and notes that the majority of the international media transferred from the "Rashid Hotel" to the "Palestine Hotel" at the recommendation of US forces. He then describes the killing of Couso from the impact of a tank round fired by a US tank situated 1.5 kilometers from the Palestine Hotel. According to the indictment, Lt. Colonel Philip de Camp of the 64th Armored Regiment, 3rd Infantry Division ordered Captain Philip Wolford, commander of the unit that fired the tank round, to fire a round at the hotel. The shot was allegedly fired by the third serviceman, Sergeant Thomas Gibson. Judge Pedraz's charging document states that "The (US) military forces, including the three aforementioned individuals, knew that the Palestine Hotel was located in a civilian area, and that it was occupied by journalists. There is no evidence that a "sniper" nor of gunfire from any part of the Palestine Hotel against (US) forces."

MADRID 00000800 002.2 OF 003

-- Judicial Discussion:

Judge Pedraz indicates that the events related in the summary could constitute a "violation against the international community," as described in Article 611.1 of the Spanish Penal Code, which mandates a 10-15 year prison term for those who, "without prejudice to the harm occasioned by their conduct, in the event of an armed conflict undertake or order to be undertaken indiscriminate or excessive attacks or make the civilian population the target of attacks, reprisals, or acts or threats of violence with the intent of generating terror." Judge Pedraz cites Article 608.3 of the Penal Code, which describes protected persons as "the civilian population and persons protected under the IV Geneva Convention of 12 August 1949 and by Additional Protocol I of 8 June 1977." He then adds a charge of "aggravated murder" against the three servicemen and concludes that there exist "rational indicators" that the actions of the servicemen constituted criminal acts.

-- Judge Pedraz asserts that (unspecified) comments in the media by one of the accused of the circumstances of the incident confirmed the existence of "an order, authorization of that order, and the firing of a tank round," a sequence Judge Pedraz says was further supported by the USG "report" (Judge Pedraz's quotes) on the incident. Judge Pedraz then discusses the recommendation by "the Pentagon" for foreign journalists to move to the Palestine Hotel, indicates that the "media" reported to "Embassies, the Pentagon, and Washington" the GPS coordinates of the Hotel, indicates that US military forces were advised not to target the Palestine Hotel, and claims that "Secretary of State Colin Powell acknowledged that it was known that the Palestine Hotel was full of journalists."

-- Pedraz disputes the conclusion of the USG investigation that the servicemen responded appropriately and within the rules of engagement to the suspected threat of a sniper or

enemy spotter at the Palestine Hotel, because USG forces should have known that the Palestine Hotel was a civilian facility and that the "flash" seen by USG forces could have been the reflection of a camera lens or a camera flash. Judge Pedraz further notes attacks by US aircraft against Al-Jazeera and other media facilities near the Palestine Hotel, implying that USG forces were deliberately targeting the international media. Pedraz alleges that there is sufficient evidence to warrant charges the shot fired by the US tank that killed Couso, "without evidence of any threat whatsoever... constitutes an "attack, reprisal, act, or threat of violence with the objective of terrorizing" journalists, as indicated by the attacks the same day against Al Jazeera and Abu Dhabi TV." On this basis, Judge Pedraz orders the "provisional arrest" of the named US servicemen.

Charges:

Judge Pedraz orders the indictment of the three US servicemen and instructs the notification of the three defendants via an MLAT to US authorities. Further Judge Pedraz indicates that "once the (subjects) are at the disposition of (Spanish courts)," they should provide a bond of one million Euros (\$1.37 million) to cover potential civil liability as a result of the criminal investigation and trial. Under Spanish law, the National Court prosecutor has three working days to present an appeal to Judge Pedraz's indictment.

//DCM CONTACTS MINISTRY OF JUSTICE//

13. (SBU) The DCM contacted Secretary of State for Justice (Undersecretary equivalent) Julio Perez Hernandez on April 27 to draw his attention to the USG's concerns regarding this case. The DCM noted the USG's respect for the independence of the Spanish judiciary but emphasized our disappointment with the issuance of this indictment after the USG had provided a comprehensive report demonstrating that we had already fully investigated the circumstances of Couso's death. Perez Hernandez (who only recently assumed his position) said that he knew the general outlines of the Couso case but was unaware of both this indictment and of the latest actions by Judge Pedraz. However, Perez Hernandez

MADRID 00000800 003.2 OF 003

said that he would try to make contact with National Court Chief Prosecutor Javier Zaragoza to determine how the prosecutors intended to respond.

14. (SBU) Shortly after the DCM's conversation with Perez Hernandez, MOJ Director General for International Relations Cristina Latorre called him to say report that the MOJ had been unable to contact Chief Prosecutor Zaragoza. Latorre said that Judge Pedraz's actions had come as a complete surprise to the MOJ, noting that she agreed that there were no grounds for war crimes or murder charges and had worked with prosecutors in 2006 to get the case dismissed.

//MEDIA INQUIRIES//

15. (SBU) This is a major development in the Spanish context and we expect to receive many questions from local media regarding the USG response. As we have throughout this case, the Embassy will deploy the previously approved guidance below, last used in response to media inquiries on January 16, 2007:

"On behalf of the Government of the United States, we reiterate our profound sympathy for the death of the Spanish journalist and of the Reuters correspondent Taras Protsyuk in the Palestine Hotel in Baghdad. The US authorities undertook a detailed investigation of the incident. We shared the results of the investigation with Spanish authorities. The investigation concluded that US military forces acted within the rules of engagement in that zone of armed conflict."

//COMMENT//

¶6. (SBU) Legat confirmed with DOJ that DOJ has not received the MLAT which Judge Pedraz instructed be delivered in connection with this indictment. It is our understanding that transmittal of the MLAT will take several weeks to make its way from the Spanish Ministry of Justice to DOJ. If the USG does not acknowledge a Spanish MLAT or otherwise cooperate in this case, it is possible that the case could be suspended or archived, since Spanish law does not provide for trial in absentia. However, this would leave the charges against the US servicemen pending. Respected figures in the Ministry of Justice and Interior and within the Zapatero Administration have told us that they agree with the USG view on the legal validity of this case and have assured us that the case was so weak that it would eventually crumble. Clearly Judge Pedraz (considered a difficult judge in the judicial community) is of another mind and intends to aggressively pursue this case. We will continue to engage at a high level with Spanish Government officials to press the case for the dismissal of the charges against the US servicemen.

Aguirre